QUESTIONS PRESENTED

1. Whether the district court erred in concluding that petitioner had presented insufficient evidence of national origin, sex, and age discrimination to survive a motion for summary judgment.

2. Whether the district court abused its discretion in refusing to consider petitioner's unsworn affidavits as evidence.

3. Whether petitioner's right to pursue a de novo action in federal court precludes a claim based on allegations of conflict of interest in the Equal Employment Opportunity Commission's administrative handling of a discrimination claim against itself as an employer.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-463

PETE Q. SALAS, PETITIONER

v.

GILBERT F. CASELLAS, CHAIRMAN,
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 69-77) is unpublished, but the decision is noted at 59 F.3d 1242 (Table). The opinion of the district court (Pet. App. 50-68) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 1995. The petition for a writ of certiorari was filed on September 18, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner applied for a position as a Budget Analyst in the San Antonio District Office of respondent's agency, the Equal Employment Opportunity Commission.[1] Pet. App. 70. Petitioner, an Hispanic male, age 59, was one of six individuals selected for an interview. *Ibid.* The interviewing official recommended the hiring of another interviewee, Victoria Cavazos, a 41-year-old Hispanic female. *Id.* at 70-71. Cavazos was ultimately hired for the position. *Id.* at 71.

Petitioner filed a discrimination complaint with the Equal Employment Opportunity Commission. Pet. App. 71. The Commission investigated the complaint and found no cause. *Ibid.* Petitioner then pursued his complaint through the administrative hearing process. *Ibid.* The administrative law judge (ALJ) determined that petitioner had not been the victim of unlawful discrimination. *Ibid.* The Commission adopted the ALJ's recommended decision. *Id.* at 71-72.

Petitioner filed suit in federal court, alleging that he was rejected for the position because of his national origin, sex, and age in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (Title VII), and the Age Discrimination in Employment Act

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[1] This suit was brought against the Chairman of the Equal Employment Opportunity Commission in accordance with 42 U.S.C. 2000e-16(c) (1988 & Supp. V 1993), which provides that in an action brought by a federal employee or applicant for employment, "the head of the department, agency, or unit, as appropriate, shall be the defendant." When this case was decided in the district court, the Chairman of the Equal Employment Opportunity Commission was Tony E. Gallegos. Gilbert F. Casellas is the Commission's current Chairman.

of 1967, 29 U.S.C. 621 *et seq.* (ADEA). Pet. App. 72. The parties conducted extensive discovery. The district court, after permitting two discovery extensions, imposed a final discovery deadline. After that deadline had passed, petitioner filed a motion to compel production of certain documents. C.A. R.E. 518. The district court denied the motion to compel on the ground that it was not timely filed. *Ibid.*

Following discovery, respondent moved for summary judgment. Pet. App. 72. Respondent pointed to record evidence showing that petitioner was rejected because of his poor showing in the interview. *Id.* at 75. In response to the motion, petitioner asserted that he was more qualified than the candidate who was selected, because he held a B.A. degree and was qualified to work at a higher General Schedule (GS) level in government service. He also pointed to deposition testimony by an EEOC employee that the EEOC official responsible for filling the position had mentioned factors other than petitioner's performance at the interview in explaining why petitioner was rejected, namely, that petitioner had given him a GS-13 rating that had expired and that petitioner would probably not be interested in a GS-5 position. *Id.* at 60, 64-65. In addition, petitioner submitted certain self-styled "affidavits" that purported to show that the San Antonio District Office had a history of discrimination against older Hispanic males. *Id.* at 56. None of the affidavits was sworn or declared to be true under penalty of perjury. *Ibid.*

The district court granted the motion for summary judgment. Pet. App. 50-68. The court determined that petitioner could not make out a prima facie case of national origin discrimination because the position was filled by someone who "was also a member of the

protected class." *Id.* at 58. With respect to the claims of age and sex discrimination, the court concluded that petitioner had established a prima facie case. *Ibid.* The court held, however, that petitioner had failed to establish that respondent's stated reason for not selecting petitioner was pretextual. *Id.* at 60-61, 66. With respect to petitioner's claim that he was the "highest qualified" candidate for the job, the court noted that the EEOC was authorized to fill the position "at the GS-5, GS-7, *or* GS-9 level," so petitioner's B.A. degree and higher GS level did not "necessarily mean that he was more highly qualified for the position at issue." *Id.* at 61. The court further concluded that the fact that the EEOC hiring official had mentioned additional bases for not selecting petitioner was insufficient to establish that the EEOC's primary asserted reason, petitioner's performance at the interview, was pretextual. *Id.* at 64-65. The court refused to consider petitioner's unsworn "affidavits" because they were "neither sworn nor declared to be true under penalty of perjury" and, thus, were not "proper summary judgment evidence." *Id.* at 56.

2. The court of appeals affirmed. The court first ruled that the district court had erred in finding that petitioner could not make out a prima facie case of national origin discrimination. Pet. App. 73-74. Citing *Hornsby* v. *Conoco, Inc.*, 777 F.2d 243, 246-247 (5th Cir. 1985), the court noted that it was not necessary for petitioner to demonstrate that the position was filled by someone outside of the protected class in order to establish a prima facie case. *Id.* at 74. Although it disagreed with the district court on this point, the court of appeals nevertheless affirmed the district court's entry of summary judgment. *Ibid.* The court concluded that respondent had offered a

legitimate, non-discriminatory reason for not selecting petitioner—his poor performance in the interview—and that petitioner had "failed to provide factual evidence that could lead a reasonable jury to conclude that the EEOC's reason for not hiring [petitioner] is a pretext for national origin discrimination," *id.* at 75, or gender or age discrimination, *id.* at 76. The court also affirmed the district court's rulings on the various discovery-related issues raised by petitioner. *Id.* at 77 n.*.

ARGUMENT

1. Petitioner argues that the court of appeals "erred in affirming the district court's grant of summary judgment" because there were genuine disputes as to material facts. Pet. 16.[2] In support of this contention, petitioner raises a number of issues that are no longer in dispute in the case. He argues, for example, that the district court mistakenly concluded that "petitioner could not make out a *prima facie* case because the selectee was also an Hispanic." Pet. 24. In his brief on appeal, however, respondent acknowledged that petitioner had made out a prima facie case of national origin discrimination. Resp. C.A. Br. 4-5. The court of appeals agreed, finding that the district court had erred in concluding otherwise. Pet. App. 74. The court of appeals rejected petitioner's claims, not because of any failure of proof at the prima

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[2] Petitioner appears to have inverted the argument headings in his petition. Petitioner's arguments with respect to the granting of summary judgment are included under the heading that references the district court's exclusion of petitioner's "affidavit" evidence. Pet. 18. Petitioner's arguments on the exclusion of evidence are under the heading that speaks to the granting of summary judgment. Pet. 16.

facie stage, but because petitioner's evidence was insufficient to raise a question of fact on the issue of pretext.

Petitioner renews his claim that the evidence was sufficient to raise a question of fact on the issue of pretext. In support of that contention, he points to testimony that the EEOC official responsible for filling the position mentioned factors other than petitioner's performance at the interview as bases for the decision not to hire petitioner. Petitioner urges that those different factors establish that respondent's reliance on petitioner's performance at the interview is pretextual. Pet. 34. Petitioner is correct that "fundamentally different justifications for an employer's action," *Washington* v. *Garrett*, 10 F.3d 1421, 1434 (9th Cir. 1993), or "inconsistencies in * * * the decisionmaker's testimony," *Castleman* v. *Acme Boot Co.*, 959 F.2d 1417, 1422 (7th Cir. 1992), may raise a genuine issue of material fact on the issue of pretext. In this case, however, the court of appeals reviewed the record and determined that the additional and fully consistent factors mentioned by the decisionmaker "are insufficient to raise a genuine issue of material fact as to pretext." Pet. App. 76. That factbound determination does not merit review.

Petitioner also points to his qualifications, maintaining that he was "clearly best qualified" for the position and that that establishes pretext. Pet. 39-40. The district court, however, reviewed the requirements of the position being filled and the respective qualifications of petitioner and the applicant who was selected and found that petitioner's B.A. degree and higher G.S. level did "not necessarily mean that he was more highly qualified for the position at issue."

Pet. App. 61. No further review of that determination is warranted.

Petitioner further asserts that the "hiring policies of the San Antonio District office of the EEOC shows [*sic*] a history of age discrimination." Pet. 36. While petitioner may believe this to be the case, there is no record evidence to support such a contention.[3] The court of appeals applied the correct legal standards and determined that petitioner had presented no competent evidence of pretext. Nothing in the court's disposition merits Supreme Court review.

2. Petitioner contends that he "was erroneously denied admission of evidence at the trial court level which established age and national origin discrimination." Pet. 18. The evidence in question consisted of certain statements, offered in the form of "affidavits," that were "neither sworn nor declared to be true under penalty of perjury." Pet. App. 56. The district court, acting within its discretion, disregarded the unsworn statements. See *Nissho-Iwai American Corp.* v. *Kline*, 845 F.2d 1300, 1305-1306 (5th Cir. 1988) (citing to "settled rule" that affidavits must either be sworn or made under penalty of perjury to be proper summary judgment evidence).

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[3] Petitioner complains that he "would have been able to clearly show the gross statistical imbalance against persons within his protected group" had the district court "ordered the Commission to answer petitioner's discovery as fully as they [*sic*] should have." Pet. 14. The district court denied petitioner's discovery request because it was filed outside the discovery deadline set by the court, which had already been extended on two occasions. C.A. R.E. 518; Resp. C.A. Br. 13. The court acted well within its discretion in cutting off discovery.

Petitioner suggests that the affidavit evidence should have been accepted by the court because the various statements were "submitted via a Bill of Exceptions at the administrative hearing." Pet. 18. This case, however, was brought as a de novo action in federal court. See 42 U.S.C. 2000e-16(c) (1988 & Supp. V 1993); 29 U.S.C. 633a(c). The court was not reviewing an agency decision or deciding the case on the basis of an administrative record. Petitioner, as the non-moving party in the district court, was obligated to produce competent evidence "that would support a jury verdict." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). Petitioner failed to meet his evidentiary burden.

3. Finally, petitioner maintains that "[t]he agency created an inherent and substantial conflict of interest by acting as both the respondent and the appellate authority at the administrative stages of this case." Pet. 2. Both Title VII and the ADEA provide individuals with a de novo right of action in federal court. That right of action is the sole remedy for any alleged errors in the Commission's handling of an administrative complaint. See, *e.g.*, *Scheerer* v. *Rose State College*, 950 F.2d 661, 663 (10th Cir. 1991), cert. denied, 505 U.S. 1205 (1992); *Ward* v. *EEOC*, 719 F.2d 311, 313-314 (9th Cir. 1983), cert. denied, 466 U.S. 953 (1984); *Gibson* v. *Missouri Pacific R.R.*, 579 F.2d 890, 891 (5th Cir. 1978), cert. denied, 440 U.S. 921 (1979).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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